

COEUR ROCHESTER, INC.

IBLA 2001-365

Decided June 12, 2002

Appeal from decision of the Nevada State Office, Bureau of Land Management, requiring immediate posting of a replacement reclamation bond for mining operation. NVN-064829.

Affirmed.

1. Mining Claim: Plan of Operations: Bonds

A BLM decision requiring the immediate posting of a replacement reclamation bond for a mining operation will be affirmed where the surety becomes financially insolvent. The existence of a reinsurance policy indemnifying the surety against loss under the bond for any sum that might be owing and unpaid by the surety does not provide reason for BLM not to take such action where (1) the reinsurance agreement is for less than the required bond amount; (2) the reinsurance agreement is not executed on standard forms; (3) there is no evidence that the reinsurer is obligated to pay BLM in the event of the insolvency of the surety; and (4) the authority of the reinsurer's agent appears to be limited to an amount well below the required bond amount.

APPEARANCES: William F. Boyd, Esq., Coeur d'Alene, Idaho, for appellant; Elaine England, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Coeur Rochester, Inc. (CRI), has appealed the July 5, 2001, decision of the Nevada State Office, Bureau of Land Management (BLM), requiring CRI to immediately post a replacement reclamation bond for its Rochester Silver Mine.

The record shows that Amwest Surety Insurance Company (Amwest) filed surety bond No. 1313926 on March 22, 1996, in the amount of \$2,108,817. CRI was principal; Amwest was surety. The bond provided coverage to reclaim disturbance on approved mining plan of operations NVN-064629. BLM accepted the bond as filed, representing 25 percent of \$8,435,267, the

required bond amount. BLM noted in its decision approving the bond that CRI had also "provided evidence of applying for a corporate guarantee in the amount of \$6,326,451 with Nevada Division of Environmental Protection (NDEP)," and that "NDEP's acceptance of the corporate guarantee will provide the remaining 75 percent of the required bond amount." (BLM Decision dated Apr. 3, 1996, at 1.) It is not clear whether that "corporate guarantee" was accepted or, if so, how long it remained in effect.

On December 22, 1998, NDEP notified CRI that, as a part of its update of CRI's reclamation plan, it was reviewing the surety on the operation. NDEP indicated that the reclamation liability had increased to approximately \$19,500,000 and gave CRI warning that its surety would be increasing substantially in February 1999. (Letter from NDEP to CRI dated Dec. 22, 1998, at 1.)

On February 9, 1999, BLM's Winnemucca (Nevada) Field Office (WFO) issued a decision notifying CRI that, pursuant to 43 CFR 3809.1-9(b), the reclamation bond amount would be set at \$21,511,480. WFO required that "[t]he full reclamation bond amount of \$21,511,480 shall be posted with the BLM Nevada State Office (NSO) within 60 days after the date of receipt of" the decision. (WFO Decision dated Feb. 9, 1999, at 1.) It was evidently later agreed that the increase to \$21,511,480 would be "phased in" gradually. ^{1/}

On August 23, 1999, CRI filed a rider to the pending surety bond increasing the amount of coverage provided under that bond to \$11,100,000. That amount exceeded the then current underwriting limitation of Amwest. To fix that problem, Swiss Reinsurance America Corp. (SRA) issued a reinsurance agreement in the amount of \$9,100,000 to reinsure and counter-secure the excess bond amount written by Amwest. On October 14, 1999, NSO issued a decision accepting both the rider and the reinsurance agreement, noting that the "purpose of the [reinsurance] agreement is to indemnify the obligee against loss under the bond for any sum up to \$9,100,000 which may be owing and unpaid by Amwest under" the surety bond. (NSO Decision dated Oct. 14, 1999, at 1.) It is thus clear that NSO regarded Amwest as the party from which it would collect under the bond and that it saw SRA as merely indemnifying Amwest for any amount that Amwest could not pay.

By decision dated January 19, 2000, WFO made its revised bond determination for the Rochester Mine plan of operations. It set the total reclamation bond at \$20,096,634, but provided that the increase in bond amount would continue to be phased in. The first increase in the bond amount was \$6,759,993, raising the total bond that needed to be posted to \$17,859,993. CRI was allowed 60 days to post the increased bond and did so

^{1/} On Nov. 2, 1999, WFO notified NSO that an interim financial guarantee amount of \$11,100,000 had been set "pending the submission, review, and approval of a revised reclamation plan that included a schedule for phased bonding"; that the deadline for approval of such revision was Dec. 31, 1999; and that the financial guarantee required at that time for CRI's project was \$11,100,000. The purpose of establishing the "schedule for phased bonding" was to allow the financial guarantee to be raised to the \$21,511,480 level that NDEP had found necessary.

on March 6, 2000, when SRA again issued a reinsurance agreement in favor of the Department in the amount of \$15,859,993.

On December 26, 2000, WFO received Notice of Cancellation of Bond Number 1313926 from Amwest, to be effective 90 days after receipt of notice. The stated reason for the cancellation was "Non-renewal." On February 7, 2001, NSO issued a decision requiring a replacement bond. However, Notice of Reinstatement of the bond was filed with BLM on March 5, 2001, apparently solving this problem for a short time.

On May 29, 2001, NSO issued a decision requiring "replacement bonding," holding as follows:

Bonding in the amount of \$17,859,993 continues to be required on this plan of operations.

Pursuant to Treasury regulations at Title 31 CFR 223.1, a surety's bonds are acceptable (to the United States) as long as the surety company continues to hold a certificate of authority. Also, Treasury regulations at Title 31 CFR 223.17 provide that when Treasury determines a surety no longer has the continued ability to keep and perform its contracts, the Secretary of the Treasury will revoke the surety's certificate of authority.

Amwest Surety Insurance Company was terminated as an acceptable surety on Federal bonds effective May 23, 2001. [CRI] is required to maintain satisfactory bonding for surface reclamation on its operations conducted under regulations at Title 43 CFR 3809. Therefore, we request [that CRI] provide satisfactory replacement bonding in the amount of \$17,859,993 within 60 days from the date of this decision.

BLM's case record contains a news release and notice to obligees from Amwest's website stating that Amwest was declared "insolvent" by the District Court of Lancaster County, Nebraska, on June 7, 2001. A similar notice was issued by the Nebraska Department of Insurance on June 7, 2001.

On July 5, 2001, NSO issued the decision under appeal noting that bonding in the amount of \$17,859,993 continued to be required on CRI's plan of operations, and that Amwest had secured a reinsurance agreement from SRA executed in favor of the Department in the amount of \$15,768,993. BLM explained that the reinsurance agreement "reinsures and counter-secures the bond underwritten by Amwest in the event Amwest fails to pay any default under the bond which is in excess of the bond amount up to the amount of the reinsurance." NSO noted that the cancellation time affecting performance bonds issued by Amwest was set by the Nebraska State Court as July 6, 2001. Accordingly, BLM required CRI to post a satisfactory replacement bond to BLM in the amount of \$17,859,993 immediately. CRI filed a timely notice of appeal from BLM's decision on August 2, 2001.

[1] Surety bonds are a recognized means of ensuring both compliance with measures designed to mitigate environmental impacts of mining and reclamation of mining sites. See Sierra Club, Angeles Chapter, 156 IBLA 144, 154 (2002). A mining plan of operations may be disapproved where the amount of bonding is insufficient to ensure that impacts will be mitigated and the land will be successfully reclaimed. See National Wildlife Federation, 126 IBLA 48, 63 (1993).

The apparent insolvency of Amwest, the surety under the only bond approved by BLM, has not been disputed by CRI. Amwest's insolvency plainly justified BLM in requiring CRI to immediately seek a replacement reclamation bond for mining operation. Even assuming that the SRA reinsurance agreement could be seen as the equivalent of a surety bond, upon Amwest's insolvency, the amount guaranteed was short by an amount equal to that previously guaranteed by Amwest exclusively, approximately \$2 million. That fact alone justified BLM in requiring that the existing bond be replaced immediately.

On appeal, CRI relies exclusively on the fact that Amwest had a reinsurance agreement with SRA for a substantial percentage of the required bond amount. We perceive several questions that justified BLM's decision not to rely on that reinsurance agreement as a replacement for the performance bond.

First, by purchasing reinsurance from SRA, Amwest may have secured rights to collect money from SRA to cover its obligations under Amwest's bond with BLM, and those rights may have been an adequate asset to justify BLM's decision to accept Amwest's bond even in the face of indications that Amwest lacked assets sufficient to back the bond. See 31 CFR 223.11(b)(1). However, there is no evidence that the Government had rights to collect any moneys directly from SRA. That is, there is nothing evincing privity of contract between the Government and SRA: SRA may have been free, under the terms of the reinsurance agreement, not to pay the Government if Amwest either failed to make required reinsurance premium payments to SRA or became insolvent or otherwise lost status as a legal entity. Amwest's insolvency therefore raised the possibility that the reinsurance agreement would not be enforceable.

Second, we find nothing in the present record supporting CRI's assertion that the reinsurance agreement is actually an obligation in favor of the United States as obligee. We note that the reinsurance agreement was not prepared on a standard government form. See 31 CFR 223.11(b)(1). Nor does it contain language specifically addressing SRA's liability in the event of Amwest's insolvency.

Finally, the power of attorney that was evidently submitted along with this reinsurance agreement appears to limit the authority of Irene E. Meyers to bind SRA to "co-surety participation" not exceeding \$10,000,000. That amount is far less than the current required bond amount.

We hold that, in these circumstances, BLM properly required the immediate posting of a replacement bond in the required bond amount.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

T. Britt Price
Administrative Judge